

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74-1309

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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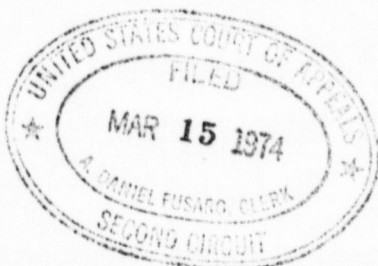
In the Matter of

UNISHOPS, INC.

Debtor-Appellant

: In Proceedings for
: an Arrangement
: No. 73-B-1208
: Docket Number
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APPELLEE BRUNSWICK
CORPORATION'S BRIEF



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FACTS

By Order to Show Cause dated December 13, 1973, the Appellant, Unishops, Inc. (the "Debtor") sought to enjoin all vendors claiming to be creditors of its several subsidiary corporations from pursuing their claims against such subsidiaries. Said Order to Show Cause provided for a stay prohibiting such vendors from pursuing their claims against the Debtor's subsidiaries pending a hearing on the Debtor's application for a permanent injunction.

In the Petition in support of its Order to Show Cause the Debtor alleges, in essence, that it and its subsidiaries are engaged in operating retail businesses on a consolidated basis and that as of June 1, 1973 it notified

all vendors who had been selling merchandise to its subsidiaries that all future purchases for resale by its subsidiaries would be made by it and on its credit. The Petition does not allege that the Debtor's subsidiaries are insolvent or that they are mere shams or conduits of the Debtor rather than separate viable legal entities.

The Mercury Marine Division of Brunswick Corporation ("Mercury"), one of the several appellees in this appeal, claims to be a creditor of Goldfine's, Inc., one of the subsidiaries of the Debtor, on account of merchandise sold and delivered to Goldfine's, Inc. or its affiliated corporations (collectively referred to as "Goldfine's"). Said merchandise was sold by Mercury to Goldfine's pursuant to franchise agreements dated July 5, 1973 and October 4, 1973, which were executed in the name of Goldfine's and provide that the franchisees' rights thereunder cannot be assigned to or assumed by any other party. It is Mercury's contention that its sales pursuant to said franchise agreements were made with and shipped to Goldfine's on its credit.

THE ISSUES

1. Does the Bankruptcy Court have jurisdiction to restrain an action against a subsidiary of the Debtor

which is not a party to the insolvency proceeding on the grounds that the liability is not the subsidiary's but that of the Debtor?

The Bankruptcy Judge and the District Judge answered in the negative.

2. Does the Petition of the Debtor in support of its application raise any issues which require a hearing to determine jurisdiction?

The Bankruptcy Judge and the District Judge answered in the negative.

ON THE FACE OF THE PETITION THE DEBTOR IS NOT SEEKING RELIEF WITH RESPECT TO ITS PROPERTY. ACCORDINGLY THE BANKRUPTCY COURT HAS NO JURISDICTION IN THE MATTER

The Debtor contends that it was error for the Bankruptcy Court, without holding an evidentiary hearing, to deny its application for an order staying vendors who claim to be creditors of its subsidiaries from pursuing their claims against those subsidiaries for the price of merchandise allegedly sold to the subsidiaries.

It is the essence of the Debtor's claim, as set forth in its petition, that its subsidiaries are not liable to the vendors, but rather that it is the Debtor which incurred the merchandise liability, and is liable therefor.

The appellee-vendors have made claim against the

Debtor's subsidiaries for the purchase price of merchandise which they allege were sold to the subsidiaries upon the credit of the subsidiaries. These vendors do not make a claim upon the Debtor for payment of the purchase price.

The Debtor's various subsidiary corporations have not filed petitions for insolvency relief, and are neither parties to this proceeding nor have they been subjected to the jurisdiction of this Court.

Even if we were to assume the truth of the allegations set forth in the petition, that pursuant to agreements with each of the vendors, that the merchandise was sold to the Debtor and not to its subsidiary, this does not confer jurisdiction upon the Bankruptcy Court. If these allegations are ultimately found to be true in the case of some or all of the vendors, the respective subsidiary corporations would have a complete defense in any actions which had been brought against them, that is, that they did not purchase the merchandise and did not enter into any contractual arrangement with the vendor.

It would appear to be the gravamen of the petition that the Bankruptcy Court should restrain unwarranted actions against the Debtor's subsidiaries. This contention flies

squarely in the face of the holding in In re Beck Industries, Inc. 479 F.2d 410, (2nd Cir. 1973) Cert. Den. 479 F.2d 1067. In that case, the Court held that it was without any jurisdiction whatever to restrain actions against a debtor's subsidiary even where it was contended that those actions would directly or indirectly cause interference with debtor's affairs. As the Court stated at page 419:

"... the Trustees contend that restraint of the Maryland suit will facilitate their administration of the debtor's estate, already a complicated task since they will otherwise be forced to divert their energies to defense of that suit in an inconvenient forum in order to preserve the value of the debtor's stock interest in subsidiary. In our view this argument puts the cart before the horse. The corporate veil cannot be disregarded merely because it would make for "an efficient and economical administration" of the debtor's estate, Greenbaum v. Lehrenkrauss, 73 F.2d 285, 287 (2d Cir. 1934)."

The Debtor herein does not claim, as did the Trustees in In re Beck, Industries, Inc. that the corporate entity of the subsidiary corporations should be disregarded, i.e., that their respective corporate veils should be pierced, and accordingly this issue is not raised here.

In summary, the face of the petition demonstrates that the Debtor seeks relief that is not within the Court's jurisdiction to grant. Accordingly, the Bankruptcy Judge

properly denied the Debtor the relief sought in its petition without an evidentiary hearing.

CONCLUSION

The order of the District Court affirming the order of the Bankruptcy Court denying the application of the Debtor should be affirmed as a matter of law.

Respectfully submitted,

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Arrangement No. 73-B-1208

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Docket Number 74-1309

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

The undersigned being duly sworn, deposes and says:

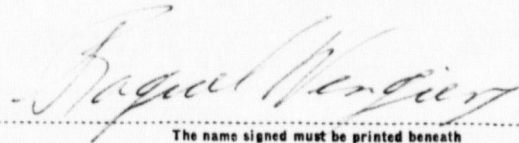
Deponent is not a party to the action, is over 18 years of age

That on the **14th** day of **March** 19 **74** deponent served the annexed **Brief**
on

Levin & Weintraub
Attorneys for Appellant
225 Broadway
New York, New York
~~XXXXXXXXXX~~
~~XXXXXXXXXX~~

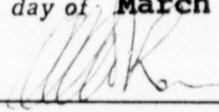
and on the Attorneys for and/or appellees as set forth in the
annexed Schedule.

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in — ~~XXXXXXXXXX~~ — official depository under the exclusive care
and custody of the United States post office department within the State of New York.


The name signed must be printed beneath

Raquel Wengier

Sworn to before me
this **14th** day of **March** 19 **74**



ALLEN N. ROSS
Notary Public, State of New York
No. 60-8333460
Qualified in Westchester County
Commission Expires March 30, 1976

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